83 - 1108

No.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1983

MICHAEL J. ST. CLAIR,
Petitioner,

VS.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS FOR REVIEW

(1) Is a perjury indictment deficient because it presents two different truth allegations, one of which does not directly contradict the alleged falsehood?

(2) Was the prosecutor required to rebut petitioner's prima facie case of bad faith misjoinder under Rule 8, Federal Rules of Criminal Procedure, and if so, does the harmless error rule apply?

PARTIES BELOW

At trial, the parties were Petitioner St. Clair, Respondent United States, and Victor Cowley, whose case was joined with Petitioner's before trial and whose conviction was reversed by the Ninth Circuit Court of Appeals. Petitioner is filing Notice pursuant to Rule 19.6 that Mr. Cowley has no interest in the outcome of this Petition.

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OPINIONS BELOW

The opinion of the Ninth Circuit Court of Appeals was certified for publication but has not yet been published. It can be found at Appendix (App.) A-1. Relevant rulings in the district court are found at App. A-19-26 and were not reported.

STATEMENT OF JURISDICTION

Judgment was entered by the Ninth Circuit Court of Appeals on November 15, 1983. Jurisdiction in the United States Supreme Court is granted by 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES, RULES

Section 1623 of Title 18, United States Code, is set out in full at App. A-27.

Rule 8(b), Federal Rules of Criminal Procedure states:

> (b) Joinder of Defendants. Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count.

STATEMENT OF THE CASE

This Petition seeks review of a judgment of the United States Court of Appeals for the Ninth Circuit affirming the conviction of Petitioner Michael J. St. Clair for one count of violating 18 U.S.C. § 1623, knowingly making false material statements to a Grand Jury.

On May 10, 1982, an indictment was filed charging Petitioner Michael J. St. Clair with three counts of violations of 18 U.S.C. § 1623, and charging Co-Defendant Victor Cowley with two violations of 18 U.S.C. § 1623. St. Clair and Cowley moved to sever, and the District Court granted the motion.[1]

Thereafter, the government filed a superseding indictment charging, in Count 1, that St. Clair and Cowley conspired to obstruct justice and violate Section 1623.

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[1]For purposes of this Petition, the record may be described briefly. Petitioner has requested certification and transmittal of relevant portions of the record in the Court of Appeals pursuant to Rule 19. Those portions will provide all background. They consist of the Appellants' Joint Excerpt of Record, the Reporter's Transcript on Appeal (hereafter "R.T.") on file with that court, and St. Clair's Opening and Reply Briefs and the Brief of Appellee United States.

St. Clair was charged in Counts 2 and 3, and Cowley was charged in Count 4, with making false declarations in violation of 18 U.S.C. § 1623.

Defendants renewed their motion for severance, claiming the conspiracy count was unsupported by evidence and was an attempt to circumvent the earlier severance motion and moved to dismiss. The trial judge denied these motions. App. A-20. A jury trial followed.

At the close of the government's case, the trial judge dismissed the conspiracy count but denied the Defendants' motions for severance. App. A-22-26. After presentation of the Defendants' evidence, the jury returned a verdict of guilty against St. Clair and Cowley.

St. Clair was sentenced to 18 months imprisonment and a fine of $10,000 on each count, the prison terms to be served concurrently. Both appealed timely. The Court of Appeals reversed Cowley's conviction and St. Clair's conviction on Count 3, and affirmed St. Clair's conviction on Count 2. App. A-18.

ARGUMENT

A. The Court Should Grant the Petition to Decide Whether a Perjury Indictment With Two Different Truth Allegations, One of Which Does Not Directly Contradict the Alleged Falsehood, is Deficient.

The charging allegations of the superseding indictment in this case raise fundamental problems for pleading and proof of perjury cases. Not since *Bronston v. United States,* 409 U.S. 352 (1973), has the Supreme Court con-

sidered such problems.[2] Since *Bronston* was decided, the courts of appeals have evidenced differing interpretations of the scope and meaning of the decision outside of its narrow factual setting. This case offers this Court an opportunity to confront the two important issues raised herein and to clarify the law in this complicated and important area of federal criminal practice.

The testimony quoted in Count 2 of the superseding indictment concerns two cashier's checks made out to the Templeton Company. Count 2 reads in relevant part:

> Q. Now, are you familiar with these two checks? Do you recognize them?
>
> A. Yes.
>
> Q. How do you recognize them?
>
> A. As I indicated to you earlier, they appear to be checks that were given to me in a sealed envelope by Mr. Templeton and he asked if I would deposit them.
>
> . . . .
>
> The above testimony of Michael J. St. Clair, as he then well knew and believed, was false, in that James W. Paige caused the Templeton checks to be delivered to Michael J. St. Clair. The checks were not given to Michael J. St. Clair by "Mr. Templeton."

The truth paragraph contains two distinct statements which may be read as truth allegations. The first alleges falsehood "in that James W. Paige caused the Templeton

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[2]The Court has discussed the meaning of an "ancillary" proceeding as used in § 1623(a), *United States v. Dunn*, 442 U.S. 100 (1979), and what warnings must be given grand jury witnesses prior to their testimony. *Wong v. United States*, 431 U.S. 174 (1977); *Mandujano v. United States*, 425 U.S. 564 (1976).

checks to be delivered to Michael J. St. Clair." Grammatically, that statement constitutes a distinct truth allegation. In perjury prosecutions, where both the examiner's questioning and the phrasing in the indictment are examined critically and construed strictly, *see Bronston v. United States, supra,* 409 U.S. at 360-62; *United States v. Tonelli,* 577 F.2d 194 (3d Cir. 1978), the clear grammatical import of language should not be distorted.[3]

The second sentence, i.e. that Templeton did not give the checks to St. Clair, is a second possible truth allegation, which may be read in three different ways: as pure surplusage; as qualifying or amending the "caused by Paige" truth allegation; or as a separate and distinct second truth allegation.

The ambiguity in this truth allegation flows entirely from the Grand Jury's choice of wording. Rather than stating that Paige gave the checks to St. Clair, the grand jury chose to write that Paige "caused the Templeton checks to be delivered" to St. Clair. So worded, the "caused by Paige" truth allegation is not necessarily inconsistent with St. Clair's Grand Jury testimony.[4]

To resolve the ambiguity, the Court of Appeals for the Ninth Circuit stated: "The first sentence is merely prefa-

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[3]*See United States v. Cook,* 497 F.2d 753, 767-69 (9th Cir. 1972) (Ely, J. dissenting) (opinion adopted by the panel following *Bronston,* 489 F.2d 286, 287 (9th Cir. 1973)).

[4]The Grand Jury's choice of wording was deliberate. The truth allegation in the original indictment read: "The above testimony of Michael J. St. Clair, as he then well knew and believed, was false, in that *James W. Paige delivered the Templeton checks* to Michael J. St. Clair and asked that they be negotiated. The checks were not given to Michael J. St. Clair by 'Mr. Templeton.'" (emphasis added.)

tory to the second, which clearly states the gist of the truth allegation—that the checks were not given to St. Clair by Mr. Templeton." App. A-9. The court acknowledged that the government could have drafted the truth allegation "with greater precision," but concluded, reading the truth paragraph as it did, that the indictment was sufficient. App. A-9.

The Ninth Circuit's ruling raises two distinct issues, both of which deserve resolution by this Court. The first is whether the problem created by multiple truth allegations can be avoided by reading the allegations together without improperly amending the indictment. The second is whether the deficient indictment can be cured by a jury verdict, and if so, whether the jury must be instructed that they must be unanimous as to a particular truth allegation in order to convict.

(1) The Deficiency of the Indictment

This Court, in *Bronston v. United States, supra,* 409 U.S. at 359, noted with approval the historical observation that "the English law 'throws every fence around a person accused of perjury,'" and concluded that the law requires "that the perjury statute is not to be loosely construed." *Id.* at 360. The crime of perjury has historically been attended by safeguards not generally available in other criminal prosecutions. *Id.* at 359-61.[5]

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[5]The pleading and proof requirements under § 1623 have never been passed on by this Court. Circuit courts have held that § 1623 is a species of perjury requiring the additional safeguards applied to those accused of that crime. *United States v. Tonelli, supra,* 577 F.2d at 198 n. 3; *United States v. Matthews,* 589 F.2d 442, 444 (9th Cir. 1978), *cert. denied,* 440 U.S. 972 (1979).

The indictment in this case raises a problem of interpretation of the two truth allegations. The Court of Appeals read them together, without citing any authority and without acknowledging the danger that such a reading differs from that of the Grand Jury. While clerical errors can be corrected and surplusage in an indictment can be ignored by a trial judge, courts cannot rewrite material allegations in an indictment, either literally or through interpretation. To do so constitutes an improper amendment which in effect usurps the constitutional role of the Grand Jury.[6] In a perjury case, it is imperative that the indictment spell out on its face wherein the *Grand Jury* believed the witness's falsity lay; neither trial judge nor petit jury can inject their inferences into the indictment.[7]

Accordingly, the indictment must set out the defendant's allegedly perjurious statement, specify in what respect the Grand Jury defines the statement to be false, *and* the two must irreconcilably clash:

> No guesswork is tolerated and the indictment must set out the allegedly perjurious statements and the objective truth in stark contrast so that the claim of falsity is clear to all who read the charge.

United States v. Tonelli, supra, 577 F.2d at 195.[8]

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[6]*See Stirone v. United States*, 361 U.S. 212, 215-19 (1960) (material allegation cannot be added); *Ex parte Bain*, 121 U.S. 1, 9-13 (1887) (material allegation cannot be deleted); *United States v. Stewart Clinical Laboratory, Inc.*, 652 F.2d 804, 807 (9th Cir. 1981) (material non-trivial variance in proof from theory specified in indictment requires per se reversal of conviction).

[7]*See Stirone v. United States*, 361 U.S. 212, 215-17 (1960); *United States v. Slawik*, 548 F.2d 75, 83-86 (3d Cir. 1977); *United States v. Tonelli, supra*, 577 F.2d at 195-98.

[8]*Accord, United States v. Finucan*, 708 F.2d 838, 847 (1st Cir. 1983); *United States v. Slawik*, 548 F.2d 75, 84 (3d Cir. 1977);

Clearly, if the "Templeton" truth allegations were not in the indictment, the indictment would fail under these standards. The allegation that Paige caused the Templeton checks to be delivered to St. Clair does not irreconcilably clash with the statement that Templeton actually handed the checks to St. Clair in a sealed envelope. To draw the inference that there is such a clash (by construing the allegation to mean Paige delivered the checks) is not logically compelled but is necessary to salvage the indictment. But to do so not only would result in conviction for "implicit" perjury, barred by *Bronston*,[9] it also would contradict the clear record in this case that the Grand Jury deliberately chose *not* to allege that Paige delivered the checks.

This defect cannot be sidestepped. The Court of Appeals' reading of the truth allegation, which in effect reads out the "caused by Paige" truth allegation and focuses on the "Templeton" allegation, contradicts all of these teachings. It simply ignores the Grand Jury's clear statement that St. Clair's testimony was false "*in that* James Paige caused the Templeton checks to be delivered to Michael J. St. Clair."

This case then presents important questions concerning the extent to which the courts can ignore the Grand Jury's

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United States v. Crocker, 568 F.2d 1049, 1059-60 (3d Cir. 1977); *United States v. Lattimore*, 215 F.2d 847, 854-55 (D.C. Cir. 1954) (*en banc*). *See also* 18 U.S.C. § 1623(c) (requiring "irreconcilably contradictory" declarations for application).

[9] *See* 409 U.S. at 359; *United States v. Finucan*, 708 F.2d 838, 848 (1st Cir. 1983).

allegations in perjury cases, and what limits are to placed on purposeful prosecutorial vagueness in charging perjury. These issues are likely to arise more often than the "literal truth" issue raised in *Bronston* and are equally deserving of the Court's attention and direction. A determination that the indictment was deficient raises an additional issue —whether the jury verdict cures the defect—one not reached by the Court of Appeals. Relevant federal appellate case authority is conflicting and unclear.

(2) The Trial Jury Verdict in this Perjury Case Cannot Stand Because it Cannot be Determined Whether the Verdict Rested upon an Impermissible or Permissible Basis

The wording of the truth allegation presents the situation where the jury, or part of it, may have convicted St. Clair because it found beyond a reasonable doubt that Paige caused the checks to be delivered to St. Clair (an impermissible ground), and/or the jury, or part of it, convicted St. Clair because it found beyond a reasonable doubt that Templeton did not give the checks to St. Clair (a permissible ground). The Court of Appeals did not consider this issue.

Because there was a general verdict form, and no specific instructions on this point,[10] the record does not disclose which of the variety of bases for conviction the jury chose. The jury was given a standard unanimity instruction and instructed that the government had to prove that while testifying before a Grand Jury "the defendant made *one or more* false declarations as charged in the indictment."

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[10]The instructions are reported at R.T. October 25, 1982.

(Emphasis added.) In other words, the jurors were instructed that they could find St. Clair guilty of perjury if they found one of the statements in the falsehood paragraph to be true. This misleading direction amplified rather than cured the defect in the indictment.

Circuit courts are uncertain and divided as to whether reversal is required if the reviewing court is unable to determine from the record in a perjury prosecution whether the conviction rested upon a permissible or impermissible ground. Some courts have held that, where the question before the Grand Jury is ambiguous and susceptible of two interpretations, and where the witness's answer is false only if the question is interpreted in one way, the indictment is deficient.[11] Where one interpretation of a question makes the response non-material, and the other makes it material, some courts have required the Grand Jury at least to specify the interpretation relied upon and have found failure to do so to be grounds for dismissing an indictment.[12] Other courts have held that a witness's under-

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[11] *United States v. Tonelli, supra,* 577 F.2d at 200 (3d Cir. 1978); *United States v. Cash,* 522 F.2d 1025, 1028-29 (9th Cir. 1975); *United States v. Cook,* 489 F.2d 286 (9th Cir. 1973), approving opinion at 497 F.2d 753, 762 (9th Cir. 1972) (Ely, J. dissenting); *United States v. Wall,* 371 F.2d 398, 399-400 (6th Cir. 1967); *United States v. Lattimore,* 127 F. Supp. 405, 410-11 (D.D.C.), *aff'd,* 232 F.2d 334 (D.C. Cir. 1955); *see Vitello v. United States,* 425 F.2d 416, 425 (9th Cir.), *cert. denied,* 400 U.S. 822 (1970) (Ely, J. dissenting), *see also Bronston v. United States, supra,* 409 U.S. at 361-62.

[12] *United States v. Slawik,* 548 F.2d 75, 83 (3d Cir. 1977); *United States v. Crocker,* 568 F.2d 1049, 1056-57 and n. 7 (3d Cir. 1977).

standing of a question where the question is ambiguous can be left to the jury to decide, at least where the prosecution's interpretation is plausible.[13]

Because the phrasing of the truth allegations was ambiguous here, the only instruction that would assure that the defect in the indictment was "cured" would require the jury to find unanimously that *both* truth allegations were proved, an instruction that was not given.

The Court should decide, then, whether in a perjury case the usual presumptions of regularity of a jury verdict can override an indictment's deficiencies absent specific instructions geared to assure jury verdict based on a permissible ground.

B. The Court Should Grant the Petition to Set Standards for Bad Faith Misjoinder Under Rule 8, Federal Rules of Criminal Procedure

This case confronts the Court with a common problem in trial courts: how to counter the temptation of prosecutors to charge multiple defendants with conspiracy solely for the purpose of joinder. This is an important issue in the administration of federal criminal justice generally, and it is one which has divided the courts of appeal that have considered it.

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[13] *United States v. Finucan*, 708 F.2d 838, 848 (1st Cir. 1983); *United States v. Bell*, 623 F.2d 1132, 1136 (5th Cir. 1980); *United States v. Matthews*, 589 F.2d 442, 445 (9th Cir. 1978); *United States v. Long*, 534 F.2d 1097, 1101 (3d Cir. 1976); *United States v. Chapin*, 515 F.2d 1274, 1281 (D.C. Cir.), *cert. denied*, 423 U.S. 1015 (1975).

Under *Schaffer v. United States*, 362 U.S. 511 (1960), joinder under Rule 8(b), Federal Rules of Criminal Procedure, is proper where a conspiracy involving the joined defendants is charged. The temptation to charge a conspiracy simply to permit joinder becomes great when joinder would otherwise be improper, difficult to uphold, or has been defeated by the granting of a severance motion. But what happens when, at the end of the Government's case, it becomes apparent that the evidence does not support conspiracy and the charge is dismissed? Without direction from this Court, the courts of appeal have decided that where the conspiracy count was charged in bad faith, a Rule 29 dismissal establishes a retroactive misjoinder under Rule 8(b).[14]

Important questions presented by this case are (1) what standard courts should apply to determine when a conspiracy count has been charged in bad faith to permit joinder and (2) when bad faith is shown, whether misjoinder should be tested by the harmless error rule.

(1) Standard for Review

As discussed above, the purpose of any standard for determining if there has been retroactive misjoinder is to prevent prosecutors from bringing a conspiracy charge to

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[14] *United States v. Kabbaby*, 672 F.2d 857, 860 (11th Cir. 1982); *United States v. DeRosa*, 670 F.2d 889, 897 n. 10 (9th Cir.), *cert. denied*, . . U.S. . , 103 S.Ct. 353 (1982); *United States v. Adams*, 581 F.2d 193, 197 (9th Cir.), *cert. denied*, 439 U.S. 1006 (1978); *United States v. Levine*, 546 F.2d 658 (5th Cir. 1977); *United States v. Ong*, 541 F.2d 331, 337 (2d Cir. 1976), *cert. denied*, 429 U.S. 1075 (1977); *United States v. Aiken*, 373 F.2d 294, 299 (2d Cir.), *cert. denied*, 389 U.S. 833 (1967).

join otherwise misjoined or severed defendants. Thus, the statement of the general rule is that the addition of "a conspiracy count merely to bypass the requirements of Rule 8(b)" is bad faith.[15]

That the conspiracy in this case was charged merely to permit joinder is made clear by the record. The prosecutor brought the conspiracy charge only *after* severance had been granted. The trial court granted separate trials when defendants brought severance motions based on the original indictment. In response, the government filed a superseding indictment against the same two defendants charging conspiracy to obstruct justice and commit perjury, and substantive violations of 18 U.S.C. § 1623. At the time it filed its superseding indictment, the government had no evidence to support the conspiracy count which it did not have originally.

The defendants renewed their motions for severance, arguing that there was insufficient evidence to support a conspiracy conviction and that the charge was brought to bypass the trial court's severance order. In its Opposition to the renewed severance motion, the government insisted that it was not required to disclose its reasons for bringing the conspiracy count, and that the only limitation on prosecutors' selection of charges in a superseding indictment is the rule against prosecutorial vindictiveness.[16] The prosecutor stated that one reason he added the conspiracy count

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[15]*United States v. Adams*, 581 F.2d 193, 197 (9th Cir.), *cert. denied*, 439 U.S. 1006 (1978).

[16]*See, e.g., Blackledge v. Perry*, 417 U.S. 21, 27-29 and n. 7 (1974); *United States v. Thurnhuber*, 572 F.2d 1307, 1310-11 (9th Cir. 1977).

in the superceding indictment was that he preferred to try St. Clair and Cowley together.[17] The motion was denied because conspiracy was charged. App. A-20.

After the district court granted defendants' Rule 29 motion on the conspiracy count, the defendants renewed the severance motion. The court denied the motion, stating that the "case" was not brought in bad faith, and that he saw no evidence of prejudice to either defendant. App. A-25-26. The Court of Appeals stated: "It appears that the government did not act in bad faith, as it had a reasonable expectation that sufficient proof of a conspiracy would be forthcoming at trial." App. A-6.

The first issue for the Supreme Court on this Petition is whether the "reasonable expectation" standard is the appropriate means for weeding out cases of prosecutorial bad faith. The Court has not considered the question, and the lower courts are uncertain as to how to apply it.

Courts which have discussed retroactive misjoinder have always been faced with the situation in which a conspiracy count is dismissed at the close of the government's case, after defendants have been joined because of a conspiracy charge included in the original indictment. In the context of such cases, courts have developed a somewhat objective standard by which to determine governmental bad faith: whether the prosecutor had a reasonable expectation prior

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[17] R.T. September 10, 1982, 8:20-22.

to trial that he could prove his case.[18] On its face, this determination requires a difficult retrospective judgment which it would be better to avoid if possible.

This case presents no need for that retrospective judgment. Here the prosecutor added a conspiracy charge to reunite for trial already severed defendants. Despite opportunities to explain why the superseding indictment was brought—at the time the defendants moved for severance before trial and at the time the defendants moved for severance after the trial court dismissed the conspiracy count at the close of the government's case—the government *never* supplied any alternative explanation for why the conspiracy count was added other than solely for the purpose of joining St. Clair with Cowley. This procedural record is *prima facie* evidence that the government did "add a conspiracy count merely to bypass the requirements of Rule 8(b)." In response, the trial court should have put the burden on the government to explain its actions so the court could review them.

Putting the burden on the government to explain its actions is not a novel requirement. It is a reasonable and often-applied solution to problems arising out of the need

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[18] Thus, in this more common situation, the court must examine the evidence presented at trial, with any other submissions or explanations from the prosecutor justifying the conspiracy charge, to determine whether there was sufficient evidence to make an expectation of conviction reasonable. *See, e.g., United States v. Ong,* 541 F.2d at 337-38 (2d Cir. 1976), *cert. denied,* 429 U.S. 1075 (1977); *United States v. Aiken, supra,* 373 F.2d 294, 299 (2d Cir.), *cert. denied,* 389 U.S. 833 (1967).

to balance the interests of the defendant with traditional prosecutorial discretion.[19]

The danger of prosecutorial abuse of Rule 8(b) by charging a conspiracy solely for joinder requires that this Court establish a prophylactic rule. Where two or more defendants' trials are severed, and the government thereafter brings a superseding indictment charging conspiracy, the trial court should require the government to explain its purpose to permit the court to rectify the misjoinder *prior to trial.* Otherwise prosecutors are permitted virtually a free hand, limited only by the trial court's discretion under Rule 14. Should the government explain its rationale sufficiently to rebut the prima facie case created by the procedural record, the case may then be treated like cases where the conspiracy is charged in the original indictment.

(2) A Rule of Per Se Reversal Should Apply in Cases of Retroactive Misjoinder Under Rule 8(b)

The circuits are deeply divided over whether the harmless error rule applies to cases of misjoinder under Rule 8(b). The more traditional rule, followed by a majority of circuits, has been that misjoinder under Rule 8(b) requires reversal *per se* in order to make meaningful the

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[19]*See, e.g., United States v. Thurnhuber*, 572 F.2d 1307, 1310 (9th Cir. 1977) (vindictive prosecution; prosecutor supplies affidavit explaining government's actions); *United States v. Dennis*, 625 F.2d 782, 793-94 (8th Cir. 1980) (speedy trial; same); *United States v. Ricard*, 563 F.2d 45, 48 (2d Cir. 1977), *cert. denied*, 435 U.S. 916 (1978) (prosecutor explains decision to bring superseding indictment and demonstrates no connection between defendant's decision to reject the proposed plea agreement and prosecutor's decision to bring superseding indictment); *see also United States v. Corbitt*, 675 F.2d 626, 630 (4th Cir. 1982) (prosecutor explains new indictment brought soon after new evidence became available).

distinction between Rule 8 and motions for severance under Rule 14. Wright & Miller, *Federal Practice and Procedure, Criminal* § 145, at 29 (1982).[20] Other circuits, including the Ninth,[21] have applied the harmless error rule.[22] And some circuits appear to be uncertain and take a middle road.[23] Even in circuits applying the harmless error rule, courts have often stated that it applies only if all or substantially all of the evidence submitted at the joint trial would have been admissible in separate trials.[24]

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[20]*See United States v. Bledsoe*, 674 F.2d 647, 657-58 (8th Cir. 1982); *United States v. Kabbaby*, 672 F.2d 857, 860 (11th Cir. 1982); *United States v. Turkette*, 632 F.2d 896, 906 and n. 35 (1st Cir. 1980), *rev'd on other grounds*, 452 U.S. 576 (1981); *United States v. Diaz-Munoz*, 632 F.2d 1330, 1336-37 (5th Cir. 1980); *United States v. Graci*, 504 F.2d 411, 414 (3d Cir. 1974); *United States v. Reynolds*, 489 F.2d 4, 6 (6th Cir. 1973), *cert. denied*, 416 U.S. 988 (1974); *United States v. Eagleston*, 417 F.2d 11, 14 (10th Cir. 1969); *United States v. Spector*, 326 F.2d 345, 351 (7th Cir. 1963); *see also McElroy v. United States*, 164 U.S. 76, 81 (1896).

[21]*United States v. Satterfield*, 548 F.2d 1341, 1346 and n. 3 (9th Cir. 1977), *cert. denied*, 439 U.S. 840 (1978). The Court of Appeals in this case incorrectly applied the "abuse of discretion" standard under Rule 14, Federal Rules of Criminal Procedure. App. A-6.

[22]*See United States v. Seidel*, 620 F.2d 1006, 1014-1015 (4th Cir. 1980); *United States v. Turbide*, 558 F.2d 1053, 1061-63 (2d Cir.), *cert. denied*, 434 U.S. 934 (1977); *United States v. Jines*, 536 F.2d 1255, 1256 (8th Cir.), *cert. denied*, 429 U.S. 942 (1976).

[23]*See United States v. Hatcher*, 680 F.2d 438, 441-42 (6th Cir. 1982); *Baker v. United States*, 401 F.2d 958, 973-74 (D.C. Cir. 1968), *cert. denied*, 400 U.S. 965 (1970).

[24]*See, e.g., United States v. Chinchic*, 655 F.2d 547 (4th Cir. 1981); *United States v. Ajlouny*, 629 F.2d 830, 843 (2d Cir. 1980), *cert. denied*, 449 U.S. 1111 (1981); *United States v. Seidel*, 620 F.2d 1006, 1009-17 (4th Cir. 1980); *United States v. Satterfield*, 548 F.2d 1341, 1346 (9th Cir. 1977), *cert. denied*, 439 U.S. 840 (1978); *United States v. Franks*, 511 F.2d 25, 29-30 (6th Cir.), *cert. denied*, 422 U.S. 1042 (1975); *United States v. Daniels*, 437 F.2d 656, 661 (D.C. Cir. 1970).

This is a problem which circuit courts will regularly face. St. Clair contends that the harmless error has no place in the context of errors under Rule 8. Trial court decisions under Rule 8 are subject to *de novo* review, raising only issues of law.[25] Such review loses its teeth when trial court decisions are upheld because prejudice is not perceived at the appellate level.[26]

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[25]*See United States v. Friedman*, 445 F.2d 1076 (9th Cir. 1971); Wright & Miller, *supra*, § 145 at 527 and n. 16.

[26]Should the Court grant an opportunity for full briefing, St. Clair will argue in more detail concerning the prejudice he suffered as a result of joinder. Certainly a great deal of evidence was introduced at trial that would not have been absent joinder: Cowley's Grand Jury testimony, the endless and divergent expert testimony concerning the handwriting (which took up over a third of the trial testimony), and testimony concerning Cowley moving documents. There is additionally the evidence admitted against St. Clair based on the dismissed conspiracy charge or on Count 3 which was reversed on appeal, and the evidence concerning a Santa Barbara postmark that the Court of Appeals found to be inadmissible. App. A-15. Collectively, this evidence created substantial unwarranted prejudice to St. Clair at trial. The government's case was circumstantial except for the testimony of an admitted perjurer, whom even the trial judge found to be lacking in trustworthiness and whose financial incentives for lying were substantial.

CONCLUSION

The Petition for Writ of Certiorari should be granted and the judgment reversed.

Respectfully submitted,

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January, 1984

(Appendix follows)

United States Court of Appeals
For the Ninth Circuit

No. 82-1741

82-1742

D.C. No. CR 82-265-EFL

United States of America
Plaintiff-Appellee,

vs.

Victor Cowley and Michael St. Clair,
Defendants-Appellants.

OPINION

Argued and submitted—August 10, 1983

Filed—November 15, 1983.

Appeal from the United States District Court
for the Northern District of California
Eugene F. Lynch, District Judge, Presiding

Before: TUTTLE,* PREGERSON, and REINHARDT, Circuit Judges.

PREGERSON, Circuit Judge:

Appellants St. Clair and Cowley were convicted of violating 18 U.S.C. § 1623 for willfully and knowingly making material false declarations before a grand jury (perjury). St. Clair was convicted under counts 2 and 3; Cowley was convicted under count 4. Both appeal their convictions. St. Clair's conviction is affirmed as to count 2 and reversed as to count 3. Cowley's conviction is reversed.

*Hon. Elbert Tuttle, Senior United States Circuit Judge for the Eleventh Circuit, sitting by designation.

FACTS

St. Clair conducted business in the field of international finance as Channel Associates, located in Santa Barbara. Cowley was employed in that business. In late 1979 or early 1980, James Paige, controller of Holland Oil Company, telephoned St. Clair and explained that he wanted two cashier's checks to be cashed abroad. St. Clair agreed to cash the checks for a $25,000 fee. On February 11, 1980, Paige purchased two cashier's checks from a San Francisco bank, one for $432,946.44 and another for $670,051.00 and, at St. Clair's suggestion, designated "Templeton Company" as payee. On the same day, Paige flew to Santa Barbara and delivered the checks to St. Clair. On February 27, 1980, St. Clair and Cowley flew to Anguilla in the British West Indies, where St. Clair made an initial $50 deposit in a "Templeton Company" account at the International Investment Bank. On February 28, St. Clair and Cowley deposited the two cashier's checks in the Templeton account and instructed the bank manager to send a deposit receipt to a Mr. Andrew Templeton at a Tokyo address.

When problems arose in clearing the checks, the bank manager from the International Investment Bank tried unsuccessfully to contact Mr. Templeton. He attempted to call Templeton and sent a cable and a letter to his address in Tokyo, but was never able to locate or reach him. The manager testified that before the two cashier's checks cleared he received two letters purporting to be from Mr. Templeton, one of which bore a "Santa Barbara" postmark. When the checks finally cleared in April 1980, St. Clair advised Paige that the money was in a Swiss bank account.

The pivotal factual dispute centers on Andrew Templeton's role in the banking transaction. Appellants contend that while they were at the airport on the island of Antigua,

they happened to meet Templeton, who, after learning that they were on their way to Anguilla, asked them if they would deposit the contents of an envelope at the International Investment Bank. Cowley contends that he first met Templeton at that meeting, while St. Clair testified that he had met Templeton once previously in Nassau. The government contends that Templeton does not exist except as a fictional character in a money laundering scheme devised by appellants and Paige. There was evidence indicating that no one by the name of Templeton arrived in Anguilla between December 1, 1979 and April 30, 1980. The evidence, however, did show that on February 27, 1980, St. Clair and Cowley entered Anguilla Island by air. On that date an account in the name of the Templeton Company was opened at the International Investment Bank. The first deposit was $50.00. The next day the two cashier's checks were deposited in that account.

In December 1981, St. Clair and Cowley were subpoenaed to appear before a federal grand jury investigating Holland Oil Company. Shortly after appearing, they were jointly indicted for perjury in connection with their grand jury testimony. They moved for separate trials, and their motions were granted. Thereafter, the government went before the grand jury and obtained a superseding indictment charging appellants under 18 U.S.C. § 371 with conspiracy to obstruct justice and to make false statements to a grand jury. The superseding indictment also charged appellants with substantive perjury violations. Appellants again moved for severance, but their motions were denied. After the government presented its case, the court granted appellants' motions for judgment of acquittal on the conspiracy count. Appellants again moved for severance but

were unsuccessful. At the conclusion of a seven-day trial, the jury found St. Clair guilty of two counts of perjury and Cowley guilty of one count of perjury.

In these consolidated appeals, appellants contend that their convictions should be reversed because (1) they were prejudicially misjoined; (2) the prosecutor's questions were ambiguous, and therefore their answers were not perjurious; (3) it was error to admit hearsay testimony concerning the Santa Barbara postmark; and (4) they were unlawfully denied the opportunity to examine statements made by Paige, the key government witness, to the Federal Bureau of Investigation (FBI).

STANDARD OF REVIEW

In reviewing the trial court's rulings on misjoinder, admission of hearsay testimony concerning the Santa Barbara postmark, and Paige's statements to the FBI, we are governed by the abuse of discretion standard.[1] In reviewing the perjury counts, we apply a *de novo* standard.[2]

[1]The standard of review for determining whether a severance motion should have been granted under Fed. R. Crim. P. 14 is abuse of discretion. *United States v. Abushi*, 682 F.2d 1289, 1296 (9th Cir. 1982); *United States v. Escalante*, 637 F.2d 1197, 1201 (9th Cir.), *cert. denied*, 449 U.S. 856 (1980). The standard of review of a district court's ruling to admit evidence over a hearsay objection is abuse of discretion. *United States v. Perlmuter*, 693 F.2d 1290, 1293 (9th Cir. 1982) *citing United States v. Burreson*, 643 F.2d 1344, 1349 (9th Cir.), *cert. denied*, 454 U.S. 847 (1981). A trial judge's ruling that the government need not produce a witness's statement under the Jencks Act will not be overturned on appeal absent a clear showing of abuse of discretion. *United States v. Augenblick*, 393 U.S. 348, 355 (1969); *United States v. Singh*, 628 F.2d 758, 765 (2d Cir.), *cert. denied*, 449 U.S. 1034 (1980).

[2]The standard of review when examining a perjury indictment is *de novo;* the central question is whether the jury could conclude "beyond a reasonable doubt that the defendant understood the

MISJOINDER

The trial court originally ruled that defendants were misjoined under Fed. R. Crim. P. 8(b)[3] and ordered a severance. The government then filed a superseding indictment charging appellants with conspiracy to obstruct justice and to make false statements to a grand jury in violation of 18 U.S.C. § 371. The addition of the conspiracy count to the earlier perjury counts made joinder proper under Rule 8(b). The appellants' renewed motion for severance was denied. However, at the close of the government's case, the district court granted appellants' motion for judgment of acquittal on the conspiracy count. Appellants again moved for severance. The district court denied the motion on two grounds. The court found no evidence of bad faith on the government's part in bringing the additional conspiracy charge and also concluded that appellants suffered no prejudice as a result of the joinder.

Appellants contend that bringing a conspiracy charge after the court granted severance is prima facie evidence

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question as did the government and that, so understood, the defendant's answer was false." *United States v. Matthews*, 589 F.2d 442, 445 (9th Cir. 1978), *cert. denied*, 440 U.S. 972 (1979); *see United States v. Cook*, 489 F.2d 286 (9th Cir. 1973).

[3]Fed. R. Crim. P. 8(b) states that "[t]wo or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses."

Fed. R. Crim. P. 14 states that

> [i]f it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires.

of the government's bad faith requiring reversal of their convictions. From a review of the record, however, we are unable to say that the trial judge abused his discretion when he denied severance. It appears that the government did not act in bad faith, as it had a reasonable expectation that sufficient proof of a conspiracy would be forthcoming at trial. *See United States v. Ong*, 541 F.2d 331, 337 (2d. Cir. 1976), *cert. denied*, 429 U.S. 1075 (1977).[4]

Further, appellants argue that they were prejudiced by the joinder so as to require reversal.

> The party seeking reversal of a decision denying severance under Rule 14 has the burden of proving "clear," "manifest," or "undue" prejudice from the joint trial. (Citations omitted.) Such a party must show more than that a separate trial would have given him a better chance for acquittal. (Citations omitted.)

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[4]*United States v. Rosales-Lopez*, 617 F.2d 1349 (9th Cir. 1980), provides an additional basis for upholding the district court's severance order. There we said:

> Our circuit has refused to find the action of the prosecutor in reindicting a defendant vindictive where the charges contained in the second indictment expose the defendant to no greater risk of punishment than did those contained in the first indictment. (Citations omitted.)

Id. at 1357.

In the instant case, the first indictment charged St. Clair with three counts and Cowley with two counts of violating 18 U.S.C. § 623. Each count carried a maximum penalty of five years imprisonment or a $10,000 fine, or both. The superseding indictment charged St. Clair with two counts and Cowley with one count of violating section 1623. In addition, each defendant was named in the conspiracy count, 18 U.S.C. § 371, which also carried a maximum penalty of five years imprisonment or a $10,000 fine, or both. Thus, each defendant was exposed under the superseding indictment to no greater risk of punishment than under the original indictment.

> He must also show violation of one of his substantive rights by reason of the joint trial: unavailability of full cross-examination, lack of opportunity to present an individual defense, denial of Sixth Amendment confrontation rights, lack of separate counsel among defendants with conflicting interests, or failure properly to instruct the jury on the admissibility of evidence as to each defendant. (Citations omitted.) In other words, the prejudice must have been of such magnitude that the defendant was denied a fair trial. (Citations omitted.) Clearly, this is not an easy burden to meet.
>
> The prime consideration in assessing the prejudicial effect of the joint trial is whether the jury can reasonably be expected to compartmentalize the evidence as it relates to separate defendants, in view of its volume and the limited admissibility of some of the evidence. (Citations omitted.) The prejudicial effect of evidence relating to the guilt of co-defendants is generally held to be neutralized by careful instruction by the trial judge. (Citations omitted.)

United States v. Escalante, 637 F.2d. 1197, 1201 (9th. Cir.), *cert. denied,* 449 U.S. 856 (1980).

Appellants have not shown the requisite prejudice. Their stories were similar, thus the risk of the jury confusing the evidence with respect to each appellant was minimal. No violation of a substantive right by reason of a joint trial was shown. Furthermore, during the course of the trial, the judge was careful to give limiting instructions advising the jury that certain evidence was admitted only against a particular defendant. We therefore conclude that the trial judge did not abuse his discretion when he denied severance.

PERJURY COUNTS

Appellants contend that the perjury counts are fatally flawed for two reasons: (1) the prosecutor's grand jury questions, restated in the indictment, are ambiguous; and (2) the statements in the indictment's truth paragraph are not in stark contrast with appellants' answers before the grand jury. For the reasons set forth below, we affirm the conviction on Count 2 and reverse on Counts 3 and 4.

Bronston v. United States, 409 U.S. 352 (1973), clearly states the basic ingredient of a successful perjury prosecution: "Precise questioning is imperative as a predicate for the offense of perjury." *Id.* at 362. Stated another way: "The burden is on the questioner to pin the witness down to the specific object of the questioner's inquiry." *Id.* at 360. Moreover, as the Third Circuit correctly cautioned: "No guessing is tolerated and the indictment must set out the allegedly perjurious statements and the objective truth in stark contrast so that the claim of falsity is clear to all who read the charge." *United States v. Tonelli*, 577 F.2d 194, 195 (3d Cir. 1978). With these precepts in mind, we examine each count separately.

Count 2—St. Clair

At the grand jury hearing, St. Clair identified two cashier's checks, one for $670,051, the other for $432,947—both made out to the Templeton Company. He was then asked the questions and gave the answers repeated in Count 2 of the superseding indictment.

> Q. Now, are you familiar with these two checks? Do you recognize them?
>
> A. Yes.

> Q. How do you recognize them?
>
> A. As I indicated earlier to you, they appear to be checks that were given to me in a sealed envelope by Mr. Templeton and he asked if I would deposit them.

The truth paragraph in the indictment states:

> The above testimony of Michael J. St. Clair, as he then well knew and believed, was false, in that James W. Paige caused the Templeton checks to be delivered to Michael J. St. Clair. The checks were not given to Michael J. St. Clair by a "Mr. Templeton."

St. Clair contends that the first sentence of the truth paragraph does not contradict his testimony because that sentence could be understood to mean that Paige did not personally deliver the checks but instead *caused* them to be delivered by Mr. Templeton and, as so understood, the first sentence contradicts the second. However, the truth paragraph must be read as a whole. The first sentence is merely prefatory to the second, which clearly states the gist of the truth allegation—that the checks were not given to St. Clair by Mr. Templeton. St. Clair testified to the contrary—that Mr. Templeton gave him the checks. Although the government could have drafted the truth paragraph with greater precision, it does, in our view, sufficiently set out the allegedly perjurious statement and objective truth with stark contrast. *Bronston*, 409 U.S. at 362; *Tonelli*, 577 F.2d at 195.

Count 3—St. Clair

St. Clair appeared before the grand jury on January 7, 1982, and produced four documents: a copy of a check for $25,000 from Jack Holland & Son, Inc., a letter to St. Clair

from a lawyer named Hernand, a copy of a letter sent by St. Clair to the managing director of the bank in Anguilla, and a teletype from the managing director to St. Clair. After identifying these documents, St. Clair was asked the questions and gave the answers repeated in Count 3 of the superseding indictment.

> Q. Other than these four items, . . . do you have any other records in any way relating to Mr. Paige, Dalziel, Zenith Petroleum, Jack Holland, Jr., Perlman, Templeton Company?
>
> A. Nothing.
>
> Q. Have you prior to date of service of the subpoena any other records relating to those records, entities or persons?
>
> A. No.

After St. Clair's grand jury appearance, a search warrant was executed at the premises of Channel Associates. A file, entitled "St. Mawr, Paid Bills" was found. "St. Mawr" was an entity created by James Paige with which Channel had business dealings. Templeton Company stationery was also found. On that basis, the truth paragraph of Count 3 charged:

> The above testimony of Michael J. St. Clair as he then well knew and believed was false, in that Michael J. St. Clair had possession or control of other documents, not produced to the Grand Jury, relating to James W. Paige and "The Templeton Company."

Appellant St. Clair argues that his responses do not constitute perjury because the questions were ambiguous. He argues convincingly that the first question can reasonably be understood to ask him whether he had the described

documents with him in the grand jury room, making his answer literally true. Contrary to the government's assertion, the question that follows does not clear up the ambiguity since it is also phrased in the present tense.

The government concedes that there is a grammatical error in the second question, but contends that the second question clarifies the first. The government argues that, if the second question indeed referred to documents St. Clair had with him in the grand jury room, then the examiner would be asking the same question twice. The government seems to argue that St. Clair's interpretation is implausible because it would mean the examiner was redundant. This argument is unpersuasive since examiners often repeat a question.

The ambiguity of the second question arises from the inquiry, "[*h*]*ave* you prior to date of service of subpoena any other records. . . ?" This ill-phrased question, which seems to refer to both the present and past, can reasonably be interpreted as asking the witness: Did you have any other records prior to date of service of subpoena? Or as asking him: Do you now have other records that you had prior to the date of service of subpoena? The fact that documents relating to Paige and the Templeton Company were found at the premises of Channel Associates after St. Clair's grand jury appearance does not establish that St. Clair had those records before the date of service of subpoena or that he had them on his person or under his control when he appeared before the grand jury. In short, there is no stark contrast between the allegedly perjurious statements and the truth allegations. This being so, we rule that a jury could not conclude beyond a reasonable doubt

that St. Clair understood the question as did the government to call for records that he might have had prior to the date of service of subpoena and that so understood, appellant's answer was false. Therefore, the conviction may not stand. *United States v. Matthews,* 589 F.2d 442, 445 (9th Cir. 1978), *cert. denied,* 440 U.S. 972 (1979).

Count 4—Cowley

Before the grand jury Cowley was asked the following questions and gave the following answers stated in Count 4 of the indictment.

Q. Now, you were introduced to Mr. Templeton by Mr. St. Clair?

A. That's correct.

Q. Did you have a conversation? Did the three of you have a conversation at that time?

A. Yes. A brief one, yes.

Q. In the course of the conversation, were you asked, or Mr. St. Clair asked, to do something?

A. Yes.

Q. What were you asked to do?

A. We were asked if we were going—it came up in the conversation that we were going to Anguilla, and we were asked if we would take something with us to Anguilla.

Q. What were you asked to take to Anguilla?

A. An envelope to be deposited or to be given to a bank in Anguilla.

Q. To whom was the envelope given?

A. Mr. St. Clair.

The truth paragraph of Count 4 states:

The above testimony of Victor J. Cowley, as he then well knew and believed, was false, in that he then well

> knew and believed that James W. Paige caused the Templeton checks to be delivered to Michael J. St. Clair. He knew the checks purportedly contained in the envelope referred to were not given to Michael James St. Clair by a "Mr. Templeton."

Appellant Cowley argues that this count is defective in that the truth paragraph does not state the converse of his grand jury testimony. That testimony concerns an envelope given to St. Clair. The thrust of the truth paragraph relates to checks. Though Cowley talked about an envelope to be given to a bank, there is not one word about checks in his grand jury testimony quoted in Count 4. The examiner should have been more precise in his questioning. "It is the responsibility of the lawyer to probe. . . . If a witness evades, it is the lawyer's responsibility to recognize the evasion and to bring the witness back to the mark, to flush out the whole truth with the tools of adversary examination." *Bronston,* 409 U.S. at 358-59. The questioner was not precise. He failed "to pin the witness down to the specific object of the questioner's inquiry. *Id.* at 360. Count 4 fails to set out in "stark contrast" the allegedly false statements and the objective truth. *Tonelli,* 577 F.2d at 195. Therefore, the conviction is reversed. *See United States v. Slawik,* 548 F.2d 75, 83 (3d Cir. 1977).

ADMISSION OF TESTIMONY CONCERNING THE POSTMARK

The trial judge allowed the managing director of the International Investment Bank in Anguilla to testify, over objection, that he had received two letters purporting to be from a Mr. Templeton, one of which bore a Santa Barbara postmark. The letters were never produced at trial.

Appellants raise two objections to the admission of the banker's testimony. First, they contend that because the postmark was not authenticated at trial, the trial judge abused his discretion by admitting the testimony about it. Second, appellants argue that the postmark was an out of court statement offered to prove the truth of the matter it asserted—i.e., that the postmark was hearsay. *See* Fed. R. Evid. 801. They contend that since the postmark did not fall within any of the exceptions to the hearsay rule, the trial judge abused his discretion by admitting the banker's testimony for this additional reason. Finally, appellants claim that the admission of the testimony was not harmless and constituted reversible error.

We will address each of these contentions in order. First, we hold that the proponent of the banker's testimony, the government, was not required to authenticate the postmark as such. Fed. R. Evid. 901(a) states:

> The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the *matter in question is what its proponent claims.*

(Emphasis added).

If the government had offered the envelope bearing the postmark into evidence, it would have been required to provide circumstantial evidence that the matter in question—the envelope bearing the postmark—was authentic. In this case, however, the government sought to introduce testimony about the postmark, not the postmark itself. Live testimony from the witness stand requires no extrinsic evidence of authenticity.

Second, we do agree, on the other hand, that the testimony was inadmissible hearsay. Fed. R. Evid. 801(c) defines hearsay as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." The postmark meets this definition. Although a machine affixes the mark, a postal official is responsible for setting the machine and causing the letters to pass through it. The postmark is thus the postal official's written assertion that the letter passed through his hands at the Santa Barbara post office on a particular day. Because the government offered the testimony about the postmark to prove that the letter was mailed from Santa Barbara—exactly what the mark asserts—the postmark is hearsay.

Unlike most hearsay, however, the postmark is very reliable; there is little risk of misperception or fabrication on the part of the postal official. Even though it does not easily fit into any of the enumerated hearsay exceptions, *see* Fed. R. Evid. 803(1)-(23), the postmark's circumstantial guarantees of trustworthiness make it a perfect candidate for Fed. R. Evid. 803(24), the so-called "expanding exception":

> A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. *However, a statement may not be admitted under this exception*

> *unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, his intention to offer the statement and the particulars of it, including the name and address of the declarant.*

(Emphasis added).

In this case, the government did not give the appellants advance notice of its intention to offer the banker's testimony about the postmark into evidence. Therefore, although we find that the testimony could have fallen within Fed. R. Evid. 803(24), the lack of notice made it inadmissible hearsay.

Nevertheless, we hold that the error in admission was harmless. Since there was abundant evidence, aside from the testimony about the postmark, to support the jury's conclusion that Templeton did not exist, we find that the trial judge's admission of the testimony does not merit reversal.

PAIGE'S STATEMENTS TO THE FBI

St. Clair and Cowley filed discovery motions seeking, among other things, statements that Paige, the key government witness, made to the FBI. The government objected to disclosure of the statements contending that they were irrelevant and submitted them to the district court for *in camera* inspection. The district judge stated preliminarily that the documents were irrelevant, but reserved his final ruling until after Paige testified. Appellants never renewed their motions and the reports were never disclosed. The appellants now contend that *any* statement made by Paige

is relevant to their case and therefore should have been produced under 18 U.S.C. § 3500(b), the Jencks Act.[5]

Pursuant to 18 U.S.C. § 3500(b), a defendant is entitled to receive, upon motion, "any statement . . . of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified." 18 U.S.C. § 3500(c) provides for an in camera inspection procedure.

The defense is not automatically entitled to production of all statements in the possession of the government made by a prosecution witness. The Jencks Act requires disclosure of only statements related to the witness's direct testimony. *United States v. Jones*, 612 F.2d 453, 456 (9th Cir. 1979) *cert. denied*, 445 U.S. 966 (1980); *United States v. Knowles*, 594 F.2d 753, 755 (9th Cir. 1979). If the government contends that all or part of a statement is unrelated to the witness's testimony, then an *in camera* inspection and excision by the district judge is a sound method for rendering Jencks Act material available to the defense. *United States v. Jones*, 612 F.2d at 456.

In this case, the trial court examined the materials *in camera* and did not find them to be relevant to appellants' trial.

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[5]Appellants also requested the statements pursuant to *Brady v. Maryland*, 373 U.S. 83, 87 (1963). Under *Brady*, a defendant is entitled to any exculpatory evidence in the possession of the government. *Id.* at 87-88. Here the government contended that Paige's statements to the FBI were unrelated to the witness's testimony concerning appellants and gave the statements to the trial court for an *in camera* inspection. An *in camera* inspection is a sound approach to a *Brady* inquiry. *United States v. Jones*, 612 F.2d 453, 456 (9th Cir. 1979) *cert. denied*, 445 U.S. 966 (1980).

Furthermore, this court has independently reviewed Paige's statements to the FBI and it does not appear that anything in the statements pertains to either of the appellants or the "Templeton" transactions.

CONCLUSION

Based on the above discussion, St. Clair's conviction on Count 2 is affirmed; his conviction on Count 3 is reversed. Cowley's conviction on Count 4 is reversed.

AFFIRMED IN PART AND REVERSED IN PART.

In the United States District Court
For the Northern District of California

Before: The Honorable Eugene F. Lynch

No. CR-82-0265 EFL

United States of America,
Plaintiff,

vs.

Michael J. St. Clair and Victor J. Cowley,
Defendants.

REPORTER'S TRANSCRIPT

Friday, October 8, 1982

R.T. 40:5-41:3

* * *

Mr. Treman: Your Honor, since I'm joining in that motion on behalf of Mr. St. Clair, let me indicate to the court that, in my opinion, there may not be any cases on it, but there is a very strong due process on it.

What occurred in this case, the way it appears, is that the government elected not to proceed on the conspiracy until your Honor considered and ruled in favor of the defense motion. Then they filed a conspiracy count to the grand jury, which did only one thing: it went around your Honor's ruling.

According to the government's posture on the case, the only thing that has been accomplished by filing that count is to circumvent your Honor's ruling. And I think that

that is a due process right, once a defendant has established as a matter of case law in this case, which is what your Honor's decision was, a particular position with regard to trial.

For the government to go back and to go around that proceeding—

The Court: I cannot say that. And I do not say it when I deny the motion. Otherwise, I would be hamstringing the government in many things.

I think the government has a right to take a look at their case and make changes. And this is one that they have done; and I do not say that they deliberately did it for no other reason than to get around my ruling. All right.

* * *

In the United States District Court
For the Northern District of California

No. CR-82-0265 EFL

The United States of America,
Plaintiff,

vs.

Michael J. St. Clair and Victor J. Cowley,
Defendants.

REPORTER'S TRANSCRIPT ON APPEAL

Thursday, October 21, 1982

R.T. 1067:16-20

* * *

Mr. Treman: I make the same Rule 29 motion with regard to the perjury count concerning the handling of the checks by Mr. Templeton.

I'm not going to argue that.

The Court: I'll deny that motion.

* * *

In the United States District Court
For the Northern District of California

No. CR-82-0265 EFL

The United States of America,
Plaintiff,

vs.

Michael J. St. Clair and Victor J. Cowley,
Defendants.

REPORTER'S TRANSCRIPT ON APPEAL

Monday, October 25, 1982

R.T. 1171:5-1172:25

* * *

The Court: Yes, I am prepared to grant the motion under Rule 29 for dismissal on the charges of conspiracy and then I'll state my reasons for the record so that they will be clear.

The government proposes three grounds as to why this motion should be denied. The third ground stated is the very close association between the two defendants; the fact that they are partners, work in the same small office together and clearly had access one to the other after the 29th of December and after subpoenas were served and, of course, that they were also involved in the alleged crimes and that it's reasonable to expect that they would talk, and I don't disagree with that.

I think it's reasonable to expect they would talk. However, even the government agrees this standing alone is not sufficient, so therefore to get over that the government proposes two other reasons that should be taken in conjunction with reason number three.

Reason number one is they told the same story and an elaborate one at that, and I reread the transcript and the letters, et cetera, and although they told essentially the same story about meeting Templeton, the elaborateness is quite between the two of them.

The elaborateness comes from Mr. St. Clair. Mr. Cowley's story is not really elaborate at all.

I guess probably one should stop at the bank in light of the fact that this evidence is they brought the letter to the bank for deposit.

So you have to step back from that. They both describe Templeton slightly different, but there wasn't any question they told the same story about Templeton.

But the elaborateness isn't as clear. St. Clair is far, far more elaborate and Cowley isn't elaborate regarding Templeton.

The second ground is the statement given to Mr. Page [sic] 15 months before. Clearly on conspiracy the evidence has to be that they intended to do it before this grand jury at that time and how much weight one should give to a statement 15 months before that, when there was no grand jury, when they were talking apparently about the FBI, I question in light of taking the whole thing together.

Therefore, it seems clear to me that the case is essentially built on suspicion and surmise. Perhaps good suspicion, because of number three, and surmise, but not sufficient under the cases which go into a detailed statement, analysis of the United States versus Bufalino, which we have here talked about in some detail. Okay.

In the United States District Court
For the Northern District of California

No. CR-82-0265 EFL

The United States of America,
Plaintiff,

vs.

Michael J. St. Clair and Victor J. Cowley,
Defendants.

REPORTER'S TRANSCRIPT ON APPEAL

Monday, October 25, 1982

R.T. 1175:18-1176:12

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Okay. I'll deny the motion for severance. I see no evidence, really, that the government did not bring this in good faith at all. Merely because I am granting a Rule 29 motion does not mean that it is in bad faith.

Therefore, I must look at the government's case and I have done so and in my opinion they have not brought the case in bad faith.

Their real problem at the end of the case, at the end, now that that's all in, while they have a very strong argument in number three, the close association, et cetera, that's not enough under the case law, and the other two arguments they have, while there is some evidence, in my opinion taken as a whole are not sufficient.

But I see no evidence that they brought it in bad faith at all.

Furthermore, in addition I see no evidence of prejudice to Mr. St. Clair or—excuse me, to Mr. St. Clair and/or Mr. Cowley, and therefore I deny the motion, and in doing so I cite United States versus Benny Ong, 541 Fed Reporter 2nd, page 331. Okay.

CONSTITUTIONAL PROVISIONS, STATUTES, RULES

18 U.S.C. § 1623 reads:

(a) Whoever under oath (or in any declaration, certificate, verification, or statement under penalty of perjury as permitted under section 1746 of title 28, United States Code) in any proceeding before or ancillary to any court or grand jury of the United States knowingly makes any false material declaration or makes or uses any other information, including any book, paper, document, record, recording, or other material, knowing the same to contain any false material declaration, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

(b) This section is applicable whether the conduct occurred within or without the United States.

(c) An indictment or information for violation of this section alleging that, in any proceedings before or ancillary to any court or grand jury of the United States, the defendant under oath has knowingly made two or more declarations which are inconsistent to the degree that one of them is necessarily false, need not specify which declaration is false if—

(1) each declaration was material to the point in question, and

(2) each declaration was made within the period of the statute of limitations for the offense charged under this section.

In any prosecution under this section, the falsity of a declaration set forth in the indictment or information shall be established sufficient for conviction by proof that the

defendant while under oath made irreconcilably contradictory declarations material to the point in question in any proceeding before or ancillary to any court or grand jury. It shall be a defense to an indictment or information made pursuant to the first sentence of this subsection that the defendant at the time he made each declaration believed the declaration was true.

(d) Where, in the same continuous court or grand jury proceeding in which a declaration is made, the person making the declaration admits such declaration to be false, such admission shall bar prosecution under this section if, at the time the admission is made, the declaration has not substantially affected the proceeding, or it has not become manifest that such falsity has been or will be exposed.

(e) Proof beyond a reasonable doubt under this section is sufficient for conviction. It shall not be necessary that such proof be made by any particular number of witnesses or by documentary or other type of evidence.